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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 718

CONRAD, RUBIN & LESSER, PETITIONERS,

vs.

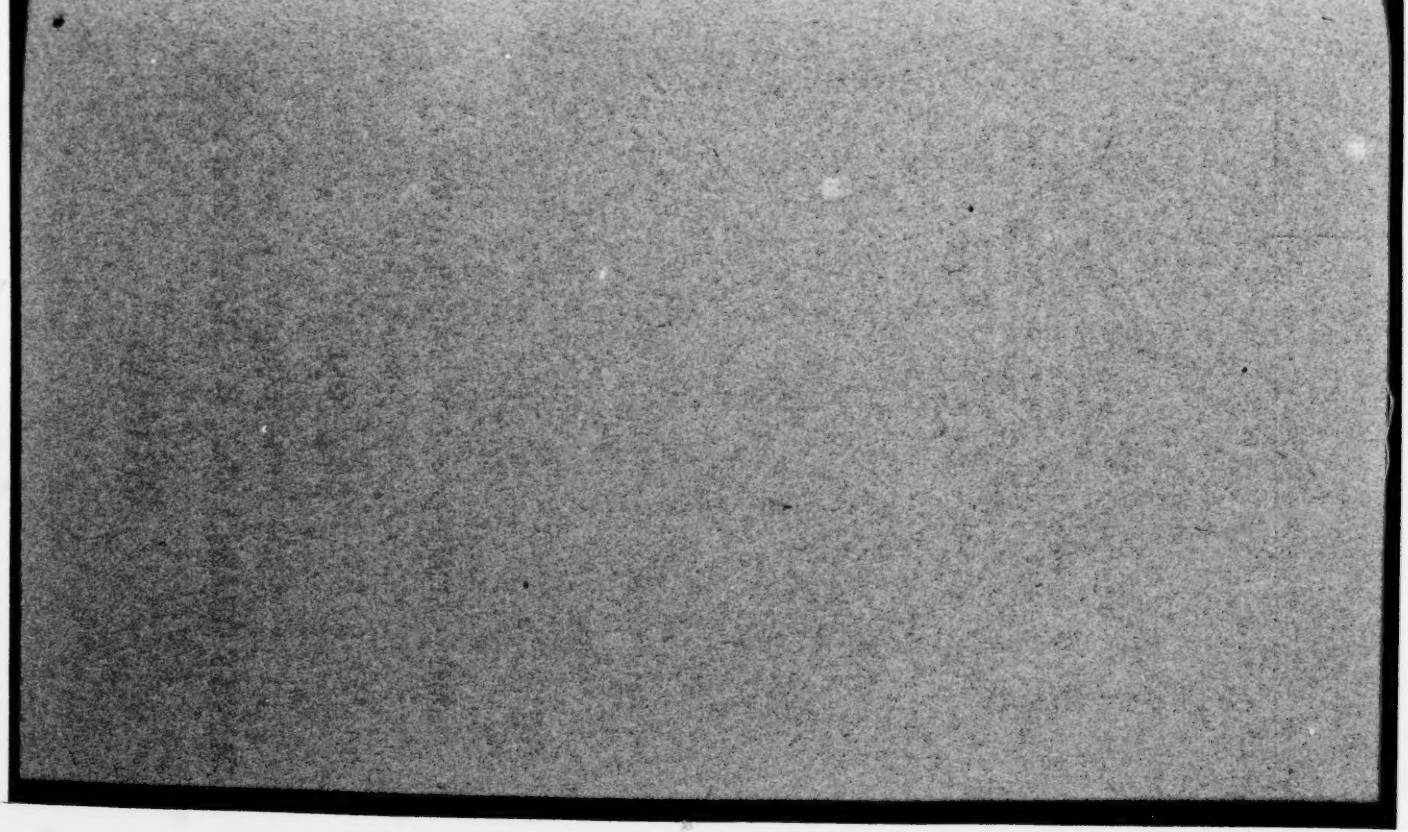
HORACE G. PENDER, TRUSTEE IN BANKRUPTCY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1933

CERTIORARI GRANTED MARCH 27, 1933

(37,415)



(37,415)

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INDEX

	Original	Print
Proceedings in United States circuit court of appeals, second circuit	1	1
Statement of case	1	1
Order allowing appeal	3	2
Record from district court of the United States, Southern New York	4	2
Notice of motion to re-examine attorneys' fees	4	2
Petition to re-examine attorneys' fees	5	3
Notice of motion to dismiss	11	6
Affidavit of William W. Conrad	13	7
Exhibit "A"—Balance sheet as of September 30, 1930, David Bell Scarves, Inc	18	11
Memorandum of referee on objection to jurisdiction	19	12
Proposed order submitted by respondents	20	12
Minutes of June 15, 1931	21	13
Minutes of June 22, 1931	22	13
Minutes of July 23, 1931	23	14
Colloquy	23	15
Offers in evidence	26	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 20, 1933

	Original	Print
Trustee's Exhibit 1—Claim of Edward M. O. Pratt for $6,262.55	31	20
Trustee's Exhibit 2—Check for $750.00 from David Bell Scarves, Inc., to Edward M. O. Pratt, dated October 23, 1930	31	20
Trustee's Exhibit 3—Four checks from David Bell Scarves, Inc., to Davil Bell, in the following dates and amounts: October 21, 1930, $500; October 28, 1930, $600; November 1, 1930, $510; November 5, 1930, $250	32	21
Trustee's Exhibit 4—Three checks from David Bell Scarves, Inc., to Israel Bell, in the following dates and amounts: October 23, 1930, $500; October 28, 1930, $100; November 1, 1930, $150	35	22
Trustee's Exhibit 5 (for Iden.)—Testimony of David Bell before Referee on January 22, 1931	37	23
Trustee's Exhibit 6—Dividend Sheet, dated March 12, 1931	39	24
Trustee's Exhibit 7—Affidavit of William W. Conrad, sworn to June 30, 1931	39	24
Trustee's Exhibit 8—Testimony of William W. Conrad before Referee on May 18, 1931	39	25
Trustee's Exhibit 9—Check for $2,500 from John I. Hart Corporation to David Bell Scarves, Inc., dated November 3, 1930	51	34
Trustee's Exhibit 10—Order dated November 17, 1930, appointing Irving Trust Co. receiver in bankruptcy	52	35
Memorandum of referee on motion to re-examine attorneys' fees	53	35
Proposed order submitted by respondents on trustee's application	54	36
Order appealed from	56	37
Respondents' exceptions	58	39
Petition to review	60	39
Referee's certificate	62	40
Order confirming order of referee, etc.	65	42
Opinion of Francis G. Caffey, D. J.	67	43
Assignment of errors	71	46
Stipulation as to exhibits	73	47
Stipulation as to record	74	48
Clerk's certificate (omitted in printing)	75	
Opinion, Swan, J.	76	49
Decree	79	53
Clerk's certificate (omitted in printing)	81	
Order allowing certiorari	82	54

[fols. a & 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of DAVID BELL SCARVES, INC., Bankrupt; CONRAD, RUBIN & LESSER, Appellants

STATEMENT

This is an appeal from an order of the United States District Court for the Southern District of New York, signed by District Judge Francis G. Caffey, on October 1, 1931, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, directing the appellants to turn over to Horace G. Pender, as Trustee in Bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, as property of the said bankrupt estate, and dismissing appellants' petition to review.

This proceeding was commenced on or about June 1, 1931.

The appellee is Horace G. Pender, Esq., as Trustee in Bankruptcy herein.

There has been no change in parties since the commencement of this proceeding.

The Trustee's notice of motion and petition to reexamine attorneys' fees were filed June 22, 1931.

[fol. 2] The cross-notice of motion of the appellants was filed June 22, 1931.

The said motion of the Trustee and the said cross-motion of the appellants were heard on June 22, 1931, and on July 23, 1931, by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy.

The hearing on the appellants' petition to review was held before Hon. Francis G. Caffey, District Judge, on September 16, 1931.

No question was referred to any commissioner or commissioners, master or referee, except as herein stated.

The order appealed from, confirming the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, and dismissing the said petition to review, was entered on October 1, 1931.

The appeal herein was taken on October 31, 1931.

[fol. 3] IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of DAVID BELL SCARVES, INC., Bankrupt; CONRAD, RUBIN & LESSER, Appellants

ORDER ALLOWING APPEAL—NOV. 16, 1931

A motion having been made herein by counsel for the appellants for leave to appeal from a certain order of the District Court, dated October 1st, 1931;

Upon consideration thereof, it is

Ordered, that said motion be and hereby is granted.

Wm. Parkin, Clerk.

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy. No. 49939

In the Matter of DAVID BELL SCARVES, INC., Bankrupt

NOTICE OF MOTION BY TRUSTEE

SIR: Please take notice that upon the annexed petition of Horace G. Pender, as Trustee herein, duly verified the 29th day of May, 1931, and upon all the pleadings and proceedings heretofore had herein, a motion will be made before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, at his offices, No. 280 Broadway, in the Borough of Manhattan, City of New York, on the 8th day of June, 1931, at 3.00 o'clock in the afternoon of said day, or as soon thereafter as counsel can be heard, for an order under §§ 60d and 67e of the Bankruptcy Act to re-examine the payment of $2,500.00 by David Bell Scarves, Inc., the bankrupt herein, to Conrad, Rubin & Lesser, attorneys, and for an order directing the said attorneys to turn over to your petitioner, as Trustee, the sum of $2,500.00, or such portion thereof as the Court may deem proper, as part of the assets belonging to this estate and for such other and further relief as

to the Court may seem just and proper in the prem-
[fol. 5] ises.

Dated New York, May 26, 1931.

Yours, etc., Krause & Hirsch, Attorneys for Trustee, 225 Broadway, Borough of Manhattan, City of New York.

To Conrad, Rubin & Lesser, Esqs., Respondents, 150 Broadway, Borough of Manhattan, City of New York.

In United States District Court

[Title omitted]

Petition to Re-examine Attorney's Fees

To Hon. Oscar W. Ehrhorn, referee in bankruptcy:

The petition of Horace G. Pender respectfully shows and alleges upon information and belief:

[fol. 6] As and for a First Count

First. That this is a proceeding pursuant to § 60d of the National Bankruptcy Act of 1898 and the amendments thereto to re-examine a transfer of property by David Bell Scarves, Inc., bankrupt, to Conrad, Rubin & Lesser, attorneys at law, and to determine whether or not the said transfer of property as and for attorneys' fee in contemplation of bankruptcy was reasonable or not, and if unreasonable, to direct the return of any excess thereof for the benefit of the estate.

Second. That on or about the 15th day of December, 1930, your petitioner was duly elected Trustee in Bankruptcy of the above-named estate, thereafter duly qualified and has been and is acting as Trustee of the said estate.

Third. That on or about the 17th day of November, 1930, an involuntary petition in bankruptcy was duly filed in this Court against David Bell Scarves, Inc., a New York corporation, praying that the said corporation be adjudicated a bankrupt.

Fourth. That thereafter and on the 21st day of November, 1930, the said corporation was duly adjudicated a bankrupt in this Court.

Fifth. That prior to the filing of the said petition in bankruptcy and on the 5th day of November, 1930, the said bankrupt did transfer to Conrad, Rubin & Lesser, attorneys at law, the sum of $2,500.00, the property of the bankrupt, as compensation for legal services to be rendered by the said attorneys for the said David Bell Scarves, Inc.

[fol. 7] Sixth. That at the time of the said transfer, the said bankrupt was in financial difficulties and unable to meet its maturing obligations and that by reason thereof the said bankrupt, on the 29th day of October, 1930, called a meeting of its creditors for the purpose of determining what action, if any, should be taken in connection with its affairs and commenced at the said time negotiations with its said creditors for a settlement of its indebtedness at a sum substantially less than 100% of its liabilities.

Seventh. That prior to the calling of the said meeting of creditors, the said bankrupt on the 23rd day of October, 1930, retained one Edward M. O. Pratt, an attorney at law, for the agreed price of $2,000.00 to represent the said bankrupt in endeavoring to effect a settlement with its creditors. That pursuant to the said retainer, on the same day it paid to the said attorney on account thereof the sum of $750.00.

Eighth. That while the said negotiations were pending, David Bell, president and owner of the business, withdrew therefrom for his own use and benefit the sums below mentioned on the dates indicated:

October	21,	1930	$500.00
"	28,	"	600.00
November	1,	"	150.00
"	5,	"	250.00
Total			$1,500.00

Ninth. That while the said negotiations were pending, Israel Bell, a brother of the said David Bell and an employee of the said bankrupt, withdrew from the said com-
[fol. 8] pany the amounts below stated on the dates indicated:

October 23, 1930	$500.00
" 28, "	100.00
November 1, "	150.00
" 11, "	150.00
Total	$900.00

Tenth. That on or about the 17th day of November, 1930, pursuant to order of Hon. Robert P. Patterson, one of the Judges of this Court, the Irving Trust Company was duly appointed Temporary Receiver in Bankruptcy of the assets and effects of the above-named bankrupt. Thereafter it duly qualified and took possession of all of the tangible property of the said bankrupt.

Eleventh. That the total assets that came into the possession of the said Temporary Receiver realized the sum of $19,475.35 gross and that after deduction of administration expenses, there was turned over to the Trustee the sum of $18,304.61.

Twelfth. That there have been filed with this Court against the above-named estate and allowed proofs of claim aggregating approximately $55,000.00, exclusive of $6,000.00 in claims now under objection.

Thirteenth. That in the said matter, there have been paid as counsel fees pursuant to order of this Court the sum of $500.00 to Krause & Hirsch, as counsel for the Irving Trust Company, as Receiver, the sum of $60.00 to Eugene V. King, for services as counsel for petitioning creditors, plus $32.00 [fol. 9] for disbursements, the sum of $65.00 to Bernard A. Grossman, as counsel for the bankrupt, and consideration of the application by Edward M. O. Pratt, for further compensation as counsel for the bankrupt in the sum of $500.00 has been deferred until the final meeting of creditors in this matter.

Fourteenth. That at the time of the said transfer of the sum of $2,500.00 to Conrad, Rubin & Lesser, the bankrupt herein had on hand only a nominal cash balance and by reason thereof in order to effect the said transfer sold a quantity of merchandise to one John I. Hart on November 3, 1930, and transferred to the said Conrad, Rubin & Lesser by delivery and endorsement the identical check received

in payment for the said merchandise from the said John I. Hart.

Fifteenth. That by reason of the foregoing, the transfer aforesaid was made directly or indirectly in contemplation of bankruptcy proceedings.

As and for a Second Count Against the said Respondents

Sixteenth. Your petitioner repeats, reiterates and realleges each and every allegation set forth herein with the same force and effect as though set forth herein at length.

Seventeenth. That this is a proceeding pursuant to § 67e of the National Bankruptcy Act of 1898, and the amendments thereto to recover a fraudulent transfer.

[fol. 10] Eighteenth. That the transfer aforesaid of $2,500.00 to the respondents Conrad, Rubin & Lesser was made with the intent to delay, hinder and defraud creditors and accepted by the said respondents with like intent and not in good faith nor for a present fair consideration.

Wherefore your petitioner respectfully prays for an order under §§ 60d and 67e of the Bankruptcy Act of 1898, and the amendments thereto, that the said transfer and payment be re-examined by this Court and that the reasonableness of the said transfer be re-examined and the respondents be directed to return to your petitioner for the benefit of the estate aforesaid the sum of $2,500.00, or such portion thereof as to the Court may seem reasonable, and for such other and further relief as may be proper in the premises.

Dated New York, May 29th, 1931.

Horace G. Pender, Petitioner.

Duly sworn to by Horace G. Pender. Jurat omitted in printing.

[fol. 11] In United States District Court

[Title omitted]

Notice of Motion to Dismiss

Sirs: Please take notice that upon the petition of Horace G. Pender, verified the 29th day of May, 1931, and the no-

tice of motion herein, dated May 26th, 1931, heretofore served upon us, a motion will be made before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, upon the return date of said petition and notice of motion as adjourned, viz., on [fol. 12] the 22nd day of June, 1931, at 2.30 o'clock in the afternoon, at the office of the said Referee, No. 280 Broadway, Borough of Manhattan, City of New York, for an order dismissing the said petition upon the ground that the same and each count thereof fails to state facts sufficient to constitute a claim within the jurisdiction of the said Referee and that the same is insufficient in law upon its face, or in the alternative, for an order striking out as irrelevant and improper, paragraphs "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh," "Twelfth," "Thirteenth," "Fourteenth" and "Fifteenth" of said petition, and for such other and further relief as to the said Referee may seem just and proper.

Dated New York, June 13th, 1931.

Yours, etc., Conrad, Rubin & Lesser, Respondents.
Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

To Krause & Hirsch, Esqs., attorneys for trustee, 225 Broadway, New York City.

[fol. 13] In United States District Court

[Title omitted]

Affidavit of William W. Conrad in Support of Motion by Respondents

State of New York,
County of New York, ss:

William W. Conrad, being duly sworn, deposes and says:

I am a member of the firm of Conrad, Rubin & Lesser, respondents in the proceedings which have been commenced before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, to re-examine payment of $2,500.00 made by David Bell Scarves, Inc., to the said firm for services rendered prior to the filing of the petition in bankruptcy herein.

Upon the return date of the petition as adjourned, an application was made to dismiss the petition on the ground that the same fails to state facts sufficient to constitute a claim within the jurisdiction of the Referee and upon such application the attorneys for the Trustee consented to withdraw the Second Count of the petition. Upon discussion before the Referee as to the sufficiency of the First Count, the determination of said matter was reserved pending the filing of an affidavit showing the nature of the services ren- [fol. 14] dered by deponent's firm and of the circumstances surrounding the said transaction.

This affidavit is filed solely for the purpose of indicating affirmatively the nature of the said transaction and of the services rendered, for the purpose of establishing that such services and arrangements made therefor were not such as come within the purview of the Referee, under Section 60d of the Bankruptcy Act, and this affidavit is so filed without prejudice to the claim made by the respondents that the petition on its face fails to state facts sufficient to show the jurisdiction of the Referee with respect thereto.

Deponent was consulted by David Bell Scarves, Inc., through David Bell, one of its officers, on October 31, 1930. At that time he gave him a statement of the financial condition of the company as of September 30th, a copy of which is hereto annexed and marked Exhibit A.

As appears from said statement, while the capital of the corporation had been seriously impaired by operating losses during the preceding six months period, the corporation was entirely solvent. Its difficulty consisted in the fact that some of its liquid assets had been pledged and that other portions of its assets consisted of non-liquid merchandise, machinery and fixtures. It is obvious from the said statement that the only remedy for the business would have been to disclose its condition frankly to creditors and request an extension of time and the operation of the business under the supervision of the creditors, to the end that its assets might be liquidated without undue pressure and the business permitted to continue under such [fol. 15] restrictions as to conserve the rights of its creditors. Deponent respectfully points out that the forced liquidation of this estate in bankruptcy actually realized a very substantial amount.

Deponent has in the past had considerable experience in working out arrangements which have resulted in both protecting the rights of the creditors and at the same time saving a business from collapse and deponent has had occasion at numerous times to co-operate with the New York Credit Men's Adjustment Bureau, Inc., which is organized to protect the rights of creditors in such cases and is well acquainted with that organization and its officials.

Your deponent, when consulted by Mr. Bell, agreed to take charge of the negotiations to bring about such arrangement with creditors as would both serve the interests of the creditors and at the same time save the business of the corporation, and agreed to render such services for a fee of $2,500.00. Deponent does not at this time present to the Court a statement of the services actually rendered, in view of deponent's position that the same are not within the purview of the Bankruptcy Act and particularly Section 60d. The fact is that such services were entirely inconsistent with the purposes and scope of the Bankruptcy Act and were not in any sense within their purview. They were aimed toward the very reverse, i. e., the rehabilitation of the business of the corporation and not the destruction thereof by bankruptcy. Deponent goes further and states that the filing of a petition in bankruptcy herein by the petitioning creditors was not only bad judgment but almost a business crime. The result of the filing of a pe-[fol. 16] tition in bankruptcy compelled the liquidation of a going concern under circumstances which could necessarily realize only a small fraction of the value of the business as a going concern and the creditors have been to that extent prejudiced.

The services to be rendered by your deponent consisted in doing things which would of themselves negative the possibility of a liquidation in bankruptcy. The most extreme course which was within the contemplation of your deponent and of Mr. Bell was the continuance of the business under the supervision of an Equity Receiver, even though that course was not contemplated if the business could be continued under the supervision of a committee of creditors or a representative of the New York Credit Men's Adjustment Bureau, Inc. Your deponent has in the past at numerous times arranged with that organization for a supervisory arrangement, under which payments to credi-

tors have been assured without the expense of an equity receivership.

Your deponent in the present case had no connection whatsoever with the filing of the petition in bankruptcy nor was the same filed directly or indirectly with his knowledge, approval or acquiescence. On the contrary, the petition herein was filed by certain creditors for reasons which we are unable to understand and was neither contemplated by deponent or the said David Bell Scarves, Inc., or its officers, nor was the same in any manner under consideration at the time deponent's services were engaged and rendered. The filing of a petition in bankruptcy terminated any further usefulness which might result from the efforts made by deponent.

[fol. 17] This affidavit is filed with the express reservation of the right to a hearing as to the services rendered and a reasonable compensation to which deponent's firm is entitled by reason thereof, in the event that it should ultimately be determined that the payment therefor comes within the purview of Section 60d of the Bankruptcy Act.

William W. Conrad.

Sworn to before me this 30th day of June, 1931. Leopold O. Rothschild, Commissioner of Deeds, N. Y. City, residing in the County of New York. N. Y. Co. Cl'k's No. 101, Reg. No. 40R3. Kings Co. Cl'k's No. 38, Reg. No. 3033. Bronx County Cl'k's No. 10, Reg. No. 33R9. Queens Co. Cl'k's No. 554, Reg. No. 216. Commission expires April 21, 1933.

[fol. 18] EXHIBIT "A" TO AFFIDAVIT OF WILLIAM W. CONRAD

David Bell Scarves, Inc.

Balance-sheet as at September 30, 1930

Assets

Current Assets:			
Cash in Bank			$5,907.67
Cash on Hand			121.55
Accounts Receivable—Good		$6,617.17	
Accounts Receivable—Doubtful		2,788.81	
Accounts Receivable—Assigned	$30,230.50		
Less: Amount Received Thereon	18,138.30		
Equity in Assigned Accounts		12,092.20	
		$21,498.18	
Less: Reserve for Cash Discount		1,730.81	19,767.37
Deposits Receivable			55.00
Due from Creditors (Debit Balances)			63.04
Merchandise Inventory:			
On Hand		$23,978.83	
Salesmen's Samples		400.00	24,378.83
Fixed Assets:			
Machinery & Fixtures		$18,043.48	
Less: Reserve for Depreciation		2,560.60	15,482.88
Deferred Charge:			
Unexpired Insurance			51.56
			$65,827.90

Liabilities

Current Liabilities:			
Accounts Payable	$47,635.73		
Less: Anticipated Discount	2,528.15	$45,107.58	
Notes Payable—Trade		680.67	
Notes Payable—Bank		4,000.00	
Due to Customers (Credit Balances)		425.22	
Payroll and Expense Accrued		2,972.72	$53,186.19
Capital:			
Capital Stock Issued and Outstanding		$35,000.00	
Surplus—April 1, 1930		2,329.30	
		$37,329.30	
Deduct: Net Loss, April 1, 1930, to September 30, 1930		24,687.59	
Capital, September 30, 1930			12,641.71
			$65,827.90

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OF REFEREE ON OBJECTION TO JURISDICTION OF REFEREE MADE BY RESPONDENTS TO TRUSTEE'S MOTION TO REVIEW ATTORNEYS' FEE, PURSUANT TO SECTION 60-D OF BANKRUPTCY ACT

The undersigned Referee, after a careful consideration of the allegations, is of the opinion that the objection to the jurisdiction of the Referee is not well taken and should be overruled.

A further date may be obtained from the Referee's office for the purpose of taking testimony.

Dated New York, July 17, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 20] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED ORDER SUBMITTED BY RESPONDENTS

A petition having been filed herein by the Trustee to re-examine the payment of $2,500.00 made by David Bell Scarves, Inc., to Conrad, Rubin & Lesser, attorneys, and said petition having duly come on for hearing on the 8th day of June, 1931, and the said Conrad, Rubin & Lesser, respondents, having appeared herein and objected to the jurisdiction of the Referee and having upon due notice moved for a dismissal of the petition upon the ground that the said petition and each count thereof fail to state facts sufficient to constitute a claim within the jurisdiction of the Referee, and the said proceedings having duly come on for hearing,

Now, upon reading and filing the notice of application herein dated May 26th, 1931, and the petition of Horace G. Pender, verified May 29th, 1931, in support of said application and the cross notice of motion for a dismissal thereof, dated June 13th, 1931, and the affidavit of William W. Conrad, verified June 30th, 1931, in support of said cross-motion, and after hearing George C. Levin, Esq., in support of said application, and Samuel Rubin, Esq., in

[fol. 21] support of said cross-motion, and the petitioner having withdrawn the second count of said petition, and due deliberation having been had, it is

Ordered that the said objection to the jurisdiction of the Referee be and the same hereby is overruled; and it is further

Ordered that the motion made by the respondents to dismiss the first count of the said petition on the ground that the same does not state facts sufficient to constitute a claim within the jurisdiction of the Referee be and the same hereby is denied.

Dated New York, July —, 1931.

—— ——, Referee in Bankruptcy.

In United States District Court

In re David Bell Scarves, Inc.

Motion re Fee of Attorney for Bankrupt

Before Hon. Oscar W. Ehrhorn, Referee

Stenographer's Minutes—June 15, 1931

New York, June 15, 1931—at 2.30 p. m.

Appearances

Messrs. Krause & Hirsch, attorneys for Trustee, by Mr. Marcus.

(Adjourned by consent to Monday, June 22, 1931, at 2.30 p. m.)

[fol. 22] In United States District Court

In re David Bell Scarves, Inc.

Before Hon. Oscar W. Ehrhorn, Referee

Adjourned Hearing on Motion re Fees of Attorneys for Bankrupt

Stenographer's Minutes—June 22, 1931

New York, June 22, 1931—at 2.30 p. m.

Present: Messrs. Krause & Hirsch, for the trustee, by George C. Levin, Esq.; Messrs. Conrad, Rubin & Lesser, respondents, by Samuel Rubin, Esq.

Mr. Levin: I file notice of motion and stipulation of adjournment attached thereto, in behalf of the Trustee.

Mr. Rubin: We serve, your Honor, and file a cross-motion attacking the sufficiency of the papers, and also move to strike out a portion of them in the alternative.

Mr. Levin: With respect to that motion made by the respondents, I call your Honor's attention to the fact that the Trustee withdraws the second count set forth in the moving papers of the Trustee.

The Referee: All right, withdraws the second.

Mr. Levin: That is right, in view of the jurisdictional objection, since the relief prayed for in the second count can be granted by this Court only upon consent of the respondents.

[fol. 23] (Argument off the record.)

The Referee: Affidavit or petition for allowance, in whatever form is desired by the attorneys, to be filed and served within one week, and the hearing is adjourned to July 2, at 2.30.

(At 2.15 p. m. adjourned to Thursday, July 2, 1931, at 2.30 p. m.)

In United States District Court

In re David Bell Scarves, Inc.

Before Hon. Oscar W. Ehrhorn, Referee

Reargument re Fees of Attorneys for Bankrupt

Stenographer's Minutes—July 23, 1931

New York, July 23, 1931—at 12 m.

Appearances

Messrs. Krause & Hirsch, for the trustee, by George C. Levin, Esq.

Messrs. Conrad, Rubin & Lesser, respondents, by Samuel Rubin, Esq.

(After argument off the record.)

The Referee: I will take whatever testimony you have, Mr. Levin, with regard to services rendered.

Mr. Rubin: We appear here specially for the purpose of [fol. 24] objecting to the jurisdiction of the Court, in accordance with the notice of motion to dismiss the proceeding heretofore filed; and we submit a form of order for the signature of the Referee, denying the motion in accordance with the memorandum heretofore filed by the Referee.

Mr. Levin: I ask your Honor to refuse to sign this order, on the ground that the decision which your Honor has just made, holding that there is jurisdiction of the Court, constitutes a mere interlocutory decision in this proceeding, and is not a final determination; and that, in line with the authorities, among which I cite to your Honor the decision, in this Circuit, in re Childs v. Ultramares Corporation, 40 Fed. 2nd 474. I ask your Honor to direct the respondents, pursuant to their own request set forth in their affidavit filed in this proceeding, sworn to June 30, 1931, by William W. Conrad, to appear and give such proof as they desire with respect to the services they have rendered, in order that your Honor can determine the reasonableness of the fee paid to them.

Mr. Rubin: We take the position, your Honor, that in connection with the order which we have submitted and the order which has heretofore been signed, that the motion which has been made by us for an order dismissing this proceeding on the grounds set forth in the notice of motion, we are entitled, as a matter of law, to have determined that motion. Whether or not the order is an interlocutory order, and whether or not the same is subject to review, is a matter which is not within the province of the Referee to determine. That question can only be determined by [fol. 25] the Court.

Mr. Levin: I recognize that the respondents do not consent to the jurisdiction of this Court, but appear involuntarily, solely by direction of the Court.

The Referee: Yes. The Referee will take such testimony as may be offered with reference to the services rendered and will then make what in his judgment is a proper order,

which will properly protect the respondents in their position of lack of jurisdiction; and he holds that the matter should be submitted as one whole on the question of the value of the services and the jurisdiction, and a determination on a petition to review to the District Judge.

Mr. Rubin: I respectfully except.

Mr. Levin: Now, in connection with this proceeding, I ask you, Mr. Rubin, whether you desire the Trustee to give proof as to the allegations set forth in the first count of the petition?

Mr. Rubin: We take no position whatsoever as to any proof that the Trustee desires or wishes to give.

Mr. Levin: Well, I ask you whether you insist on formal proof being given with respect to the allegations——

Mr. Rubin (interrupting): If your Honor please, I can only answer that we cannot either concede or refuse to concede any of these allegations. We have already filed an affidavit setting forth the facts, and in that affidavit certain statements are made as to formal allegations which may be considered as proof.

(After discussion off the record.)

Mr. Rubin: For the purpose of the record, I am not questioning any of the formal allegations, as to the filing of the petition, as to the proceedings taken in connection with the [fol. 26] receivership; but all of these concessions are made without prejudice to our position, that we do not take part in this proceeding, on the merits.

Mr. Levin: I understand that perfectly, that any concessions you make here are to be without prejudice to your rights in the proceeding, and I merely ask you whether you will require specific proof, for instance, on allegations Seventh, Eighth, Ninth and Fourteenth of the petition.

Mr. Rubin: Mr. Levin, I cannot, consistently with my position, either require or waive any particular proof.

Mr. Levin: All right; I will offer formal proof then.

Offers in Evidence

From the files of this Court, I offer in evidence, and I ask that the same be deemed marked, since it constitutes

an original record, proof of claim of Edward M. O. Pratt, in the amount of $6,262.55, for legal services as set forth in a detailed memorandum annexed to the proof of claim. I ask that the claim be deemed marked Exhibit 1.

The Referee: Yes.

(Same deemed marked as Trustee's Exhibit 1, July 23, 1931.)

Mr. Levin: Reading from the exhibit just offered, may the record indicate that the enumeration of services, attached to the proof of claim, includes, among other items, the following: "David Bell Scarves, Inc., with creditors, conference with client, conference with M. J. Davis, Mr. Oppenheim, Mr. Miller, of New York Credit Men's Adjustment Bureau, arranging for examination of books of David Bell Scarves, Inc., calling meeting of creditors, attending [fol. 27] meeting of creditors, attendance at meeting of creditors, drawing corporate minutes, resignations, etc., conferring with Credit Men's Association, re deed of trust, drawing of deed of trust, attendance at Committee's meeting, re submission of new offer of settlement, etc., as agreed, $2,000, received on account $750, balance, $1250."

I offer in evidence check of the bankrupt to the order of Edward M. O. Pratt, dated October 23, 1930, in the amount of $750.

(Check marked Trustee's Exhibit 2, July 23, 1931.)

Mr. Levin: I offer in evidence, as one exhibit, four checks of the bankrupt, to the order of David Bell, of the following dates and amounts: October 21, 1930, $500; October 28, 1930, $600; November 1, 1930, $150; November 5, 1930, $250.

(Four checks marked Trustee's Exhibit 3, July 23, 1931, as one exhibit.)

Mr. Levin: I offer in evidence as one exhibit, three checks of the bankrupt to the order of Israel Bell, of the following dates and amounts: October 23, 1930, $500; October 28, 1930, $100; November 1, 1930, $150.

(Three checks marked Trustee's Exhibit 4, July 23, 1931, as one exhibit.)

Mr. Levin: I assume that with respect to paragraphs second, third and fourth of the petition, the Court will take judicial notice of the filing of the petition and adjudication and appointment of the Trustee.

The Referee: Yes.

[fol. 28] Mr. Levin: I offer in evidence, and ask that the original testimony taken in this proceeding, of David Bell, an officer of the bankrupt, before this Court on January 22 and 26, 1931, be deemed marked.

The Referee: No; not as against these respondents, because they have had no opportunity to cross-examine. It can be used as against the bankrupt, but not as against third parties: and even though no objection is made by the respondents, due to the position they take, I will deny the motion.

Mr. Levin: I would like to have the record indicate that Mr. Rubin is still in the courtroom during all this proceeding.

Mr. Rubin: He is here, but purely as a spectator. May the record state, that even though I am here and refraining from making objections, I do so, of course, without prejudice to my position.

The Referee: I appreciate that. I have so stated.

Mr. Levin: In view of your Honor's ruling, I will ask that the testimony in question be deemed marked for identification.

The Referee: Yes; it may be deemed marked for identification.

(Testimony of David Bell deemed marked Trustee's Exhibit 5 for Identification, July 23, 1931.)

Mr. Levin: I offer in evidence a filed paper in these bankruptcy proceedings, and ask that it be deemed marked as an exhibit, the dividend sheet of this Court, declaring a first dividend on March 12, 1931.

[fol. 29] (Dividend sheet deemed marked Trustee's Exhibit 6, July 23, 1931.)

Mr. Levin: And may it specifically appear, that reading from the exhibit just offered, that David Bell has filed a priority claim in the sum of $300, and a general claim in the sum of $2,355.26; and that Israel Bell has filed a priority claim in the sum of $300, and a general claim of $860.

I offer in evidence, and ask that it be deemed marked as an exhibit, as an admission against interest, the original affidavit on file in this proceeding, sworn to by William W. Conrad on June 30, 1931.

(Affidavit deemed marked Trustee's Exhibit 7, July 23, 1931.)

Mr. Levin: I offer in evidence, from the files of this Court, and ask that it be deemed and marked as an exhibit, the testimony of one of the respondents William W. Conrad, taken before this Court on May 18, 1931.

The Referee: Yes.

(Testimony of William W. Conrad deemed marked Trustee's Exhibit 8, July 23, 1931.)

Mr. Levin: And I ask that this photostatic copy of a check, which was marked as an exhibit on that examination, dated November 3, 1930, be marked as an exhibit in this proceeding.

The Referee: All right; mark it.

(Same marked Trustee's Exhibit 9, July 23, 1931.)

[fol. 30] Mr. Levin: I ask that the order of this Court appointing the Irving Trust Company as Receiver, and the proceedings and papers on file in this court relating to the discharge of the Receiver, and payments made for administration expenses in connection with that proceeding, be deemed marked as an exhibit in this case.

(Same deemed marked Trustee's Exhibit 10, July 23, 1931.)

Mr. Levin: The Trustee rests. Have you anything further to say, Mr. Rubin?

Mr. Rubin: I merely suggest this: That I understand that all of this testimony was offered over my objection and exception.

Mr. Levin: That is not so. Counsel sat here and made no objection to the various offers of proof that I made before this Court.

Mr. Rubin: I am not talking about objections to the method of proof, but over my objections to the jurisdiction of the Referee to take any testimony.

Mr. Levin: Oh, I quite agree to that.

Mr. Rubin: None of this testimony was taken with a view to determining the question of jurisdiction, because, as I understand your Honor's order, your Honor has already determined the question of jurisdiction from the affidavits. Will your Honor receive this order at this time and take it up in the regular course (submitting document)?

The Referee: Yes.

(At 12:45 p. m. closed.)

[fol. 31] TRUSTEE'S EXHIBIT 1—July 23, 1931

The claim of Edward M. O. Pratt, Esquire, filed against the estate in bankruptcy of David Bell Scarves, Inc., in the office of the referee herein, in the amount of $6,262.55. A detailed statement of the items comprising this claim appears at pages 26 and 27 of this record.

TRUSTEE'S EXHIBIT 2—July 23, 1931

David Bell Scarves, Inc., 105-107 5th Avenue

New York, Oct. 23, 1930. No. 2761.

The Chase National Bank of the City of New York, Garfield Branch, Fifth Avenue at 23rd Street, pay to the order of Edward M. O. Pratt $750.00/100, seven hundred fifty 00/100 Dollars.

David Bell Scarves, Inc. David Bell, President.

(Certification stamped across face:) Accepted. Payable only through the N. Y. Clearing House when properly endorsed. Oct. 25, 1930. The Chase National Bank of the City of New York, Garfield Branch. W. H. A.

[fol. 32] (Stamped on back:) Received payment through New York Clearing-house. Prior endorsement guaranteed. Oct. 27, 1930. The Bank of America National Association, Times Square Office, New York, N. Y. Henry J. Schuler, Vice-Pres. & Cashier.

TRUSTEE'S EXHIBIT 3—July 23, 1931

(Four Checks)

New York Oct. 21, 1930. No. 517.

Pay to the Order of David Bell $500.00/xx, five hundred and no/xx Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Stamped across face:) Certified. Payable only as originally drawn and when properly endorsed. $500 and 00 cts. Sterling National Bank & Trust Company of New York. Oct. 23, 1930. No. 006,912. (Name illegible) Teller. Do not destroy.

[fol. 33] (Endorsed on back:) O.K. David Bell. David Bell.

New York, Oct. 28, 1930. No. 566.

Pay to the order of David Bell $600.00/xx, six hundred and no/xx Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Endorsed on back:) O.K. David Bell.

New York, Nov. 1st, 1930. No. 592.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue, pay to the order of David Bell $150.00/xx, one hundred fifty 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

[fol. 34] (Endorsed on back:) O.K. David Bell, Hotel Statler, Boston. Exchange Check Account. Pay to the Order of Any Bank, Banker or Trust Co. Prior Endorsements Guaranteed. Nov. 5, 1930. The Second National Bank, 5-17, Boston, Mass., 5-17. Herbert E. Stone, Cashier.

New York, Nov. 5, 1930. No. —.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue, pay to the order of David Bell $250.00/xx, two hundred fifty and no/xx Dollars.

David Bell Scarves, Inc. David Bell, Pres.

(Endorsed on back:) O.K. David Bell. P. Phillips.

[fol. 35] TRUSTEE'S EXHIBIT 4—July 23, 1931

(Three Checks)

New York, October 23, 1930. No. 519.

Pay to the order of Israel Bell $500.00/100, five hundred 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Stamped across face:) Certified. Payable only as originally drawn and when properly endorsed. $500 and 00 cts. Sterling National Bank & Trust Company of New York. Oct. 30, 1930. No. 006,997. (Name illegible) Teller. Do not destroy.

(Endorsed on back:) Israel Bell. O.K. David Bell.

[fol. 36] New York, Oct. 28, 1930. No. 565.

Pay to the order of Israel Bell $100.00/100, one hundred 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(Stamped across face:) Certified. Payable only as originally drawn and when properly endorsed. $100 and 00 cts. Sterling National Bank & Trust Company of New York. Nov. 1, 1930. No. 007,001. (Name illegible) Teller. Do not destroy.

(Endorsed on back:) O.K. David Bell. Israel Bell. For deposit (illegible). Received Payment Through Federal Reserve Bank of New York. Prior Endorsements Guaranteed. Nov. 1, 1930. Irving Trust Company, New York, Woolworth Office.

[fol. 37] New York, November 1st, 1930. No. 593.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue, pay to the order of Israel Bell $150.00/100, one hundred fifty 00/100 Dollars.

David Bell Scarves, Inc. David Bell, Pres.

(Endorsed on back:) Israel Bell, Bell Drug Co. Peter Bell, Ph.G. Received Payment Through the Federal Clearing Section of the Federal Reserve Bank of N. Y. Prior Endorsements Guaranteed. Nov. 5, 1930. Fidelity Trust Company of New York. The Marine Midland Trust Company of New York, N. Y.

TRUSTEE'S EXHIBIT 5—July 23, 1931

(Marked for Identification)

The testimony of David Bell, taken at an adjourned first meeting before Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, on January 22, 1931, insofar as material, is as follows:

The bankrupt called a meeting of its creditors on October 29th, 1931, to determine what action should be taken in connection with its affairs.

[fol. 38] David Bell, president of the bankrupt corporation, made the following withdrawals by check for back salary that he could not draw previously because of insufficient funds:

Date	Amount
Oct. 21, 1930	$500.00 (certified)
Oct. 28, 1930	600.00
Nov. 1, 1930	150.00
Nov. 5, 1930	250.00
	$1,500.00

Israel Bell, a brother of David Bell, and employee of the bankrupt corporation, received the following payments for back salary:

Date	Amount
Oct. 23, 1930	$500.00 (certified)
Oct. 28, 1930	100.00 (certified)
Nov. 1, 1930	150.00
	$750.00

Edward M. O. Pratt, who acted as one of the attorneys for the bankrupt in its negotiations with its creditors, and with whom David Bell had agreed upon a fee of $2,000, received a payment on account of $750.00 by certified check, dated October 23, 1930.

[fol. 39] TRUSTEE'S EXHIBIT 6—July 23, 1931

The first dividend sheet, dated March 12, 1931. The referee's order provides for a dividend of 16⅔ percent.

Total amount of claims on file with the Referee	$50,174.45
Actual sum paid pursuant to dividend	8,350.96
Claims which are on file with the Referee, payment of which has been withheld due to objections filed by the Trustee	22,158.03
Total claims filed	72,332.48

TRUSTEE'S EXHIBIT 7—July 23, 1931

Affidavit sworn to by William W. Conrad, on June 30, 1931, which is set forth in full at pages 13 to 17 of this record.

TRUSTEE'S EXHIBIT 8—July 23, 1931

In re DAVID BELL SCARVES, INC.

Before Hon. Oscar W. Ehrhorn, Referee

Adjourned First Meeting

New York, May 18, 1931—at 3 p. m

Present: Messrs. Krause & Hirsch, for the Trustee, by George C. Levin, Esq.

[fol. 40] WILLIAM W. CONRAD (residing at No. 230 Central Park West, N. Y. City), being first duly sworn by the Referee, testified as follows:

Examination by Mr. Levin:

Q. What is your full name?
A. William W. Conrad.
Q. You are an attorney-at-law admitted to practice in this State?
A. I am.
Q. Do you practice individually, or under a firm name?
A. Firm name.
Q. Will you give the name and address?
A. Conrad, Rubin & Lesser, 150 Broadway.
Q. Do you know the corporation known as David Bell Scarves, Inc.?
A. I do.
Q. Did you ever do any legal work for that concern?
A. I did.
Q. Commencing when?
A. I don't know the exact date on that—when was the petition filed, do you know?
Q. November 17.
A. November 17? On or about the 5th of November, 1930—between the 5th and the 17th.
Q. Was that the first time you had ever been retained by that corporation?
A. I don't remember. In this matter, it was.
Q. Who of that company retained you?
A. David Bell.
Q. I assume you mean that your firm was retained?
A. How is that?
Q. (Question repeated.)
A. That is right.
Q. Prior to this retention, on or about November 5, did you ever do any legal work for David Bell Scarves, Inc.?
A. I don't remember.
Q. Have you no idea whatever?
A. Well, I may have done business under the other firm, Conrad & Pratt—I know I represented David Bell.
[fol. 41] Q. About how long previously would you say that took place?

A. Oh, for years. I don't know whether that corporation was formed after I split with Pratt——

Q. In connection with this retention in November, what did Mr. Bell come and ask you to do?

A. Well, I had a conference with him and he told me that he had had a meeting with some creditors—some of his creditors, and that he was contemplating a settlement, and retained me to conduct negotiations for such settlement, and also to arrange some money in order to assist him with that settlement.

Q. Do you know a Mr. Belsky?

A. I do.

Q. What is his first name? Jacob, is it?

A. Jacob, yes, that is right.

Q. What is his relationship to David Bell, if you know?

A. He is his brother.

Q. Do you do legal work for Jacob Belsky?

A. I do.

Q. You know him very well?

A. Yes.

Q. Was it through Mr. Jacob Belsky that David Bell came to you?

A. I think so.

Q. Now, on the occasion of that conference with Mr. Bell, did he tell you how badly involved his company was?

A. Well, he gave me the figures, which I studied over in the next couple of days, and——

Q. (Interrupting.) Have you those figures with you?

A. I have not.

Q. You have been subpœnaed to produce all your records in connection with your services in this matter.

A. Is that a question?

Q. Well, I want to know where those records are.

A. I have no record.

Q. You have no records whatsoever?

A. No.

[fol. 42] Q. Did you have a file on this matter?

A. I may have, but there are no records.

Q. Well, have you produced your docket entries in connection with this case?

A. No.

Q. Did you have any such?

A. No.

Q. Do you have any legal documents in connection with this matter?

A. No.

Q. Do you have any correspondence in connection with this matter?

A. I don't think so.

Q. In other words, the only thing that took place in connection with this matter——

A. (Interrupting.) Were conferences.

Q. Were conferences?

A. That is right.

Q. Now, have you any records to indicate the number of conferences that you had?

A. I have a fair recollection.

Q. My question was, have you any records to indicate the number of conferences that you had?

A. No.

Q. Well, how many conferences would you say you had on this matter?

A. 10 or 12.

Q. Now, will you please give us the dates of the various conferences and the places where they were held?

A. Well, the first conference I had was on the second Friday preceding the petition in bankruptcy. The conference was held at Mr. Belsky's office, at 205 West 39th Street, where he conducts business under the Quality Dresses, Inc. I had a further conference with Mr. Bell at my home at 230 Central Park West, on the Sunday following. I had several conferences during the next two or three days at Mr. Edward M. O. Pratt's office at 1440 Broadway, and conferred with a Mr. Davis, who was connected with David Bell Scar-es; Mr. Bell, a third brother of Mr. Bell's—I think I. Bell—at my office; and then had a con-
[fol. 43] ference on the Tuesday following my first conference, at my home, about 8 o'clock in the evening, which lasted until about 12. And then the following day, which was Wednesday, a meeting of creditors, or a meeting of the committee representing the creditors, was held at the office of David Bell Scarves, Inc., several hours. I then had a meeting at the National Credit Men's Association at 468 Fourth Avenue, a day or two thereafter; and then a further meeting the following Saturday.

Q. Any other conferences?

A. There were some others at my office, and also at the office of Mr. Belsky.

Q. How many times were you at the office of the Credit Men's Association?

A. Twice.

Q. At the occasion of those conferences who on behalf of the Credit Association handled the matter?

A. S. B. Miller and Mortimer Davis.

Q. How long did those conferences last?

A. The first conference lasted two or three hours. The next conference, about an hour and a half.

Q. Did you execute a written retainer in connection with this matter?

A. I did not.

Q. Did you give any receipt for your compensation?

A. I did not.

Q. When was the matter of compensation arranged?

A. At the first meeting I had in this matter.

Q. And what was the conversation in that connection?

A. Mr. Belsky asked how much I would charge; and I told him my usual fee in these matters is $5,000; that I was not interested and would not like to be interested in any proceeding between a debtor and his creditors for a lesser amount. He thereupon asked me if I could do something better.

[fol. 44] Q. Who made this request?

A. Mr. David Bell. And he wanted to know whether I could arrange a settlement with the creditors. I told him, "I think that a settlement possibly could be arranged and——"

Q. (Interrupting.) Did he at that time tell you what his liabilities were?

A. He did.

Q. And what was the amount stated?

A. As I remember, the liabilities, around $70,000.

Q. From whom did you get your information?

A. From Mr. David Bell.

Q. Did he supply you with any written figures?

A. He showed me a financial statement.

Q. Was anything said as to the assets available to creditors at that time to meet those liabilities?

A. The assets, at cost or market, were about the same figure.

Q. In other words, the corporation was solvent?

A. Yes.

Q. And what were your services required for?

A. Well, he was unable to meet his maturing obligations, and he wanted to effect some cash settlement with the creditors; the assets consisting of stock and machinery, not then available for payment to its creditors.

Q. Was there any talk as to the proposed figure that the creditors would realize on any settlement?

A. The proposed figure of 50 per cent. He told me if they could arrange a 50 per cent settlement, it would be satisfactory to them, they to arrange to obtain a part of this money and a part to be secured by hypothecating accounts receivable.

Q. Who is the "they" to whom you refer?

A. Well, Davis Bell and Jacob Bell.

Q. Jacob Belsky?

A. Jacob Belsky.

Q. And exactly what were your services to consist of?

[fol. 45] A. Arranging to hypothecate the accounts receivable for them, and to arrange a settlement with the creditors of the corporation.

Q. Did you know at that time that a Mr. Pratt was acting on behalf of the company?

A. I did.

Q. What was told to you in that connection?

A. That Mr. David Bell had consulted Mr. Pratt regarding this matter. However, they were not satisfied with his services; so I suggested, in view of the situation, in order not to cause any friction, that he be allowed to remain the attorney of record, and that I would work in conjunction with Mr. Pratt.

Q. You, I take it, regarded yourself as a specialist in this type of matter?

A. Not particularly, except I have had quite a bit of experience in these matters.

Q. Well, was there anything of a specially difficult nature in this matter that required additional legal services?

A. Yes; there were certain elements in this case that possibly needed a man that was trained in these kind of matters; the question of negotiating properly.

Q. What were the special elements?

A. Negotiations with creditors; having experience in such negotiations.

Q. I understood you to say that you did not claim yourself to be a specialist in this type of matter?

A. I do not, excepting I think I have had more than the ordinary experience in these matters, of the ordinary attorney.

Q. This resolved, did it not, into merely a matter of sitting down with the creditors and getting the best settlement figure possible?

A. That is correct.

Q. There were no special legal difficulties involved, were [fol. 46] there?

A. There may have been; I do not recall for the moment.

Q. Well, do you recall any now?

A. Well, it was a question of financial statements; and other questions, which I do not recall at the moment.

Q. You have no office records to refresh your recollection, I take it?

A. I have not.

Q. Well, what was the difficulty in connection with the financial statement?

A. Well, the usual trouble that you find in these kind of cases, where creditors claim statements to be false, and, of course, getting around it in a manner that you placate those creditors, in order that they may be in a position to accept, or even consider a settlement.

Q. Aside from the generalization, was there anything particular in the statement to which you refer?

A. I don't recall.

Q. Was there any talk as to how this $2,500 was to be paid, and when?

A. Cash; to be paid in cash. They told me they would have a check at my office, either the next day or the following Monday; and they did.

Q. I assume that you refused to act until you got that payment?

A. That is right.

Q. Did David Bell tell you that the company did not have the money to pay?

A. He did not.

Q. Did David Bell tell you that they would have to raise money in some way?

A. For what purpose?
Q. To pay you?
A. No.
Q. Well, how was this sum ultimately paid?
A. In cash; the entire fee to be paid in cash.
Q. Well, how was it paid?
A. By check.
Q. By check of the company?
A. No.
Q. Whose check was it?
A. I don't recall.
[fol. 47] Q. Didn't you make any inquiry when the check came in?
A. I was not interested. The corporation endorsed it and turned it over to my office and received a receipt for the check.
Q. Well, here you were dealing with an insolvent company. Weren't you interested in finding out whether the check you were receiving was a good one?
A. They were not insolvent.
Q. How much cash did they have on hand at the time?
A. I don't recall.
Q. You know as a matter of fact, do you not, that they did not have enough cash to pay your fee?
A. They told me they didn't have that day, but they would have the next day.
Q. Did they say how they were going to get it?
A. No.
Q. Who received the check for your firm?
A. I don't remember; someone in the office.
Q. Did you?
A. No.
Q. Who endorsed it?
A. I don't remember. I think some girl in the office.
Q. Isn't it a fact that you told them to go out and assign accounts receivable in order to obtain the cash to pay this fee?
A. No.
Q. Wasn't that part of your plan, to raise money by hypothecating accounts receivable?
A. If the settlement was accepted, they were to hypothecate accounts receivable and raise cash to effect such settlement.

Q. As a matter of fact, didn't Bell tell you that he had been assigning accounts receivable of the company?

A. I understood he had.

Q. So he did not need your advice or assistance in that connection, did he?

A. He did.

Q. For what?

A. To assign these accounts receivable.

[fol. 48] Q. Well, wasn't that merely a matter of negotiating with finance companies?

A. Part of it.

Q. There is nothing legal about that service, is there?

A. Oh, yes, there is.

Q. In what connection?

A. Well, the question of assigning them properly, that the assignor and the assignee are both protected in the proper manner.

Q. Well, the assignee generally looks after its protection pretty well, doesn't it?

A. Well, they have attorneys.

Q. I show you this photostatic copy of a check, and I ask you if that is the check given to you in payment for your legal services (handing)?

A. It is.

Mr. Levin: I offer this check in evidence.

(Marked Trustee's Exhibit 1, May 18, 1931.)

Q. Now, what is the last date upon which you performed services in this matter?

A. Around November 15 or 16.

Q. Well, would it help you in fixing that date if I tell you that the petition was filed on November 17?

A. Well, the last conference I had with these people was on the Monday preceding the petition.

Q. Now, up to that point what, if anything, had you accomplished?

A. I had succeeded in effecting a settlement of 50 per cent, which all the creditors agreed to receive and the debtor corporation had agreed to pay.

Q. Who on behalf of the creditors accepted that settlement?

A. The Creditors' Committee.

Q. Name them, please?

[fol. 49] A. S. B. Miller; Mr Berkow—I think he is with L. & E. Stern—that is the Century Factors; Mr. Abraham Davis; and several other representatives of the creditors of the corporation.

Q. Was that acceptance in writing or oral?

A. The acceptance was oral.

Q. And when was the 50 per cent to be paid?

A. In cash upon the receipt of the signatures of all creditors of the corporation accepting such settlement.

Q. In other words, you had not yet submitted the proposition to the individual creditors?

A. We had not.

Q. When you say that the creditors had accepted that proposition——

A. (Interrupting) The Committee of Creditors.

Q. You mean merely the Creditors' Committee had accepted the proposition?

A. That is right.

Q. Well, do you happen to know why a bankruptcy petition was filed?

A. I do not.

Q. At those various conferences with the Creditors' Committee and the members of the various associations, did you advise those individuals that you had received $2,500?

A. I did.

Q. When was that information imparted to them?

A. At the first meeting I had, I told them my fees had been paid.

Q. Did they make any statement in that connection?

A. No.

Q. Do you know who the John I. Hart Corporation is?

A. I do not.

Q. Do you know what their business is?

A. I do not.

Q. Do you know what suits were pending against the corporation at the time of your retention?

A. I do not.

[fol. 50] Q. Do you know whether there were any?

A. I do not.

Q. Was that matter discussed?

A. No.

Q. Was there any statement made to you as to why it was necessary for Mr. Bell to take up the question of settlement?

A. Well, because his funds were not in liquid condition.

Q. Were any creditors pressing him?

A. When?

Q. At the time of your first conference?

A. No.

Q. Wasn't it on account of their insistence upon collection that he came to you?

A. I don't know.

Q. That matter was never discussed?

A. No.

—— ——.

Subscribed and sworn to before me this — day of ——, 1931. —— ——, Referee.

(At 3.50 P. M. adjourned to Monday, May 25, 1931, at 3 P. M.)

[fol. 51] TRUSTEE'S EXHIBIT 9—July 23, 1931

John I. Hart Corporation, 119 West 40th Street

New York, Nov. 3, 1930. No. 1752.

Pay to the order of David Bell Scarves, Inc., $2,500.00/-100, exactly $2,500 & 00 ct. dollars.

John I. Hart Corporation. Milt L. Ernst, V.-Pres.
S. F. Feigenbaum, Secy.

Sterling National Bank & Trust Company of New York, 42nd Street at Lexington Avenue.

(On side of check:) This check is issued in payment of items as per statement following. Endorsement of payee will constitute a receipt in full.

Date: 11/3/30. Amount: 2,500.

(Endorsed on back:) David Bell Scarves, Inc. For Deposit. Conrad, Rubin & Lesser, Attorneys. Pay to the Order of the Chase National Bank of New York. Nov. 5, 1930. Prior Endorsements Guaranteed. Lawyers Trust Company.

[fol. 52] TRUSTEE'S EXHIBIT 10—July 23, 1931

Order appointing the Irving Trust Company receiver in bankruptcy, signed by Robert P. Patterson, District Judge, on November 17, 1930. The final report and accounting of the Irving Trust Company, Receiver, indicates:

Total amount of cash which came into its hands	$19,475 35
Balance turned over to Horace G. Pender, Trustee	18,304 61
Receiver's statutory commissions	334 19

The Referee's report on the receiver's accounting sets forth the following allowances:

Irving Trust Company, Receiver	$334 19
Krause & Hirsch, Esqs., Attorneys for receiver	500 00
Eugene V. King, Esq., Attorney for petitioning creditors	60 00
Bernard A. Grossman, Esq., Attorney for bankrupt	65 00
Aronson & Oresman, Accountants	300 00
Appraisers	60 00

Edward M. O. Pratt, as attorney for bankrupt, praying for additional allowance of $500.00; consideration deferred until final meeting of creditors, on the objection of receiver's counsel.

The order of Hon. Robert P. Patterson, District Judge, dated March 10, 1931, confirmed the referee's report and directed payment of allowances as set forth therein.

[fol. 53] IN UNITED STATES DISTRICT COURT

[Title omitted]

MEMORANDUM OF REFEREE ON MOTION OF TRUSTEE TO RE-EXAMINE FEE OF ATTORNEYS, CONRAD, RUBIN & LESSER

The undersigned Referee is of the opinion that the fee having been paid in contemplation of bankruptcy, as set forth in the decisions, that the fair and reasonable value of the services rendered is not in excess of $500.

An order should therefore be made directing the repayment of $2,000 to the Trustee in Bankruptcy.

Settle order on notice.

Dated August 14, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 54] IN UNITED STATES DISTRICT COURT

[Title omitted]

PROPOSED ORDER SUBMITTED BY RESPONDENTS ON TRUSTEE'S APPLICATION

An application having been made by Horace G. Pender, trustee, for a re-examination pursuant to Sections 60d and 67e of the Bankruptcy Act of a fee of $2,500.00 paid to Conrad, Rubin & Lesser, and the said application having duly come on to be heard, and the said Conrad, Rubin & Lesser having appeared and objected to the jurisdiction of the referee and having, upon due notice, moved for a dismissal of the petition upon the ground that the said petition and each count thereof fails to state facts sufficient to constitute a claim within the jurisdiction of the referee and in support of the said motion having submitted an affidavit of William W. Conrad, verified June 30th, 1931, and the second count of the petition having been withdrawn by the petitioner, and the undersigned having thereupon denied said motion to dismiss and having overruled the objections to the jurisdiction of the referee, and said Conrad, Rubin & Lesser having duly excepted to the said determination and having declined to subject themselves to the jurisdiction of the referee,

Now, upon reading and filing the notice of motion herein dated May 26th, 1931, and the petition of Horace G. Pender, [fol. 55] verified May 29th, 1931, in support of said application and the cross notice of motion for a dismissal thereof dated June 13th, 1931, and the affidavit of William W. Conrad verified June 30th, 1931, submitted in support of said cross-motion, and after hearing George C. Levin, Esq., in support of the said application, and Samuel Rubin, Esq., in support of said cross-motion, and the referee by a ruling made on July 17th, 1931, having overruled said ob-

jections to jurisdiction and having directed that testimony be taken upon the allegations of the petition, and the testimony of the petitioner having been duly taken and the respondents having declined to offer any testimony, and upon the opinion of the undersigned, filed August 14th, 1931, and upon motion of Krause & Hirsch, attorneys for the trustee, it is

Ordered that the said motion to dismiss the petition be and the same hereby is denied and the said objections to the jurisdiction of the referee be and the same hereby are overruled; and it is further

Ordered and adjudged that the fair and reasonable value of the services rendered by the respondents is the sum of $500.00; and it is further

Ordered that the said respondents, Conrad Rubin & Lesser, and the individuals constituting said firm, William W. Conrad, Samuel Rubin and C. F. Lesser, attorneys for David Bell Scarves, Inc., be and they hereby are jointly and severally directed within five (5) days from the entry of [fol. 56] this order and service of a copy thereof at their offices, No. 150 Broadway, in the Borough of Manhattan, City of New York, to turn over and pay to Horace G. Pender, as trustee in bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, the property of the said bankrupt estate.

Dated New York, August —, 1931.

—— ——, Referee in Bankruptcy.

In United States District Court

[Title omitted]

Order Appealed From

An application having come on before me for an order directing the re-examination pursuant to §§ 60d and 67e of the Bankruptcy Act, of a fee of $2,500.00 paid to Conrad, Rubin & Lesser,

Upon reading and filing the notice of motion, dated May 26, 1931, and the petition annexed thereto, verified by Horace G. Pender, on the 29th day of May, 1931, in support [fol. 57] thereof, and upon all the papers filed herein and

all proceedings heretofore had herein, and upon the stipulation of adjournment of said application, dated June 8, 1931, and upon the cross notice of motion of Conrad, Rubin & Lesser, dated June 13, 1931, praying for a dismissal of the said proceedings on various grounds therein stated, and upon the adjourned return date of the application, the Trustee having in open court withdrawn the second count set forth in his said objection and limiting the prayer for relief to the ground set forth in his first count based upon § 60d of the National Bankruptcy Act, and upon filing the affidavit of William W. Conrad, sworn to the 30th day of June, 1931, and Exhibit "A", thereto annexed, and the respondents having objected to the jurisdiction of this Court to entertain the application herein made, and after taking testimony before me and upon the exhibits marked in evidence on the said proceeding, and after hearing Krause & Hirsch, attorneys for the Trustee, by George C. Levin, Esq., of counsel, in support of the motion, and Conrad, Rubin & Lesser, respondents in person, by Samuel Rubin, Esq., of counsel, in opposition thereto, and due deliberation having been had, and upon the opinions of this Court filed herein on the 17th day of July and the 14th day of August, 1931, it is

Now on motion of Krause & Hirsch, attorneys for the Trustee,

Ordered that the firm of Conrad, Rubin & Lesser, and the individuals constituting said firm, William W. Conrad, [fol. 58] Samuel Rubin and C. F. Lesser, attorneys for David Bell Scarves, Inc., be and they hereby are jointly and severally directed within five (5) days after the entry of this order and service of a copy thereof at their offices, No. 150 Broadway, in the Borough of Manhattan, City of New York, to turn over and pay to Horace G. Pender, as Trustee in Bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, the property of the said bankrupt estate.

Dated New York, August 21, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

In United States District Court

[Title omitted]

Exceptions to Order of Referee Dated August 21st, 1931

The undersigned respondents do hereby except to the order made by Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated the 21st day of August, 1931, in a certain [fol. 59] proceeding to re-examine a payment of $2,500.00 to the undersigned, upon the following grounds, viz., that the said order is erroneous as a matter of law in that the said proceeding brought by the Trustee to re-examine the said payment made to the respondents is not within the jurisdiction of the Referee, under Section 60d of the Bankruptcy Act.

And the undersigned prays this Court that the said exceptions may be sustained.

Dated New York, August 27th, 1931.

Conrad, Rubin & Lesser, Respondents. Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

[fol. 60] In United States District Court

[Title omitted]

Petition to Review

To the United States District Court for the Southern District of New York:

The petition of Conrad, Rubin & Lesser respectfully alleges:

Your petitioners are parties to certain proceedings brought by the Trustee herein for the re-examination of a payment of $2,500.00 made to your petitioners.

That your petitioners appeared in said proceedings and upon due notice to the attorneys for the Trustee moved to dismiss the said proceeding upon the ground that the same was not within the jurisdiction of the Referee.

That the said matter came on for hearing before Hon. Oscar W. Ehrhorn as Referee in Bankruptcy and after

such hearing the said Referee overruled the objections made by your petitioners to the jurisdiction of the Referee and directed that the said proceedings be continued for the purpose of re-examining the said payment to your petitioners. That your petitioners duly excepted to said rul- [fol. 61] ing and declined to submit to the jurisdiction of the Referee and thereupon proceedings were had and testimony taken on the part of the Trustee and an order thereafter entered, dated August 21st, 1931, directed your petitioners to turn over and pay to the Trustee the sum of $2,000.00, to which order your petitioners have duly excepted.

That said order is erroneous in that the proceedings herein do not come within the scope of Section 60d of the Bankrupptcy Act by reason of the fact that the services rendered by your petitioners, for which compensation was paid prior to the filing of the petition in bankruptcy, were not services germane to the purposes of the Bankruptcy Act and were not within the purview of Section 60d of the Bankruptcy Act.

Wherefore your petitioners pray that the said order be reviewed and reversed and that the said proceeding be dismissed as not within the jurisdiction of the Referee.

Dated New York, August 27th, 1931.

Conrad, Rubin & Lesser, Petitioners on Review, by William W. Conrad.

Duly sworn to by William W. Conrad. Jurat omitted in printing.

[fol. 62] In United States District Court

[Title omitted]

Referee's Certificate on Petition for Review

To the Honorable Judges of the District Court of the United States for the Southern District of New York:

I, Oscar W. Ehrhorn, Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That in the course of such proceeding, an order hereinafter referred to was made and entered on the 21st day of August, 1931.

[fol. 63] That Conrad, Rubin & Lesser, Esqs., feeling aggrieved thereat, have filed a petition for review, which was granted.

That the errors complained of are set forth in such petition for review.

Pursuant to provisions of General Order XXVII, I hereby certify that the question presented is whether the Bankruptcy Court had jurisdiction to re-examine the fee of the respondent attorneys Messrs. Conrad, Rubin & Lesser. The undersigned respectfully refers to his memoranda opinions which memoranda are dated respectively July 17th, 1931, and August 14th, 1931.

I hand up for the information of the Judges, the following papers:

(1) Notice of motion and petition to re-examine Attorneys' Fee filed June 22nd, 1931.

(2) Stipulation of Attorneys consenting to adjourn hearing from June 8th, 1931, to June 22nd, 1931.

(3) Notice of motion of Messrs. Conrad, Rubin & Lesser, filed June 22nd, 1931.

(4) Stenographer's Minutes, pages 1 to 3.

(5) Affidavit of Respondents filed July 2nd, 1931.

(6) Memorandum of Referee on objection to jurisdiction of Referee made by respondents to Trustee's Motion to Review Attorneys' Fee, pursuant to Section 60-D of Bankruptcy Act, dated July 17th, 1931.

(7) Stenographer's Minutes of July 23rd, 1931, pages 1 to 10.

(8) Minutes of adjourned first meeting, dated May 18th, 1931, pages 85 to 98.

[fol. 64] (9) Memorandum of Referee on Motion of Trustee to re-examine fee of attorneys, Messrs. Conrad, Rubin & Lesser.

(10) Proposed order signed by Referee directing respondents to pay Trustee $2,000.00 dated August 21st, 1931.

(11) Exceptions to order of Referee dated August 21st, 1931.

(12) Petition to Review of Messrs. Conrad, Rubin & Lesser.

Pursuant to the practice duly adopted, I direct that the hearing on the petition for review be had before the Honorable District Judge holding the Bankruptcy Part, on Wednesday, September 9th, 1931.

I hereby certify that copies of this Certificate have been mailed to Messrs. Conrad, Rubin & Lesser, respondents, and to Messrs. Krause & Hirsch, attorneys for the Trustee, herein.

Dated August 29th, 1931.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 65] In United States District Court, Southern District of New York

In Bankruptcy. No. 49939

In the Matter of David Bell Scarves, Inc., Bankrupt

Order Confirming Order of Referee, etc.

A petition having been filed herein on behalf of Conrad, Rubin & Lesser to review a certain order of Hon. Oscar W. Ehrhorn, dated the 21st day of August, 1931, directing the firm of Conrad, Rubin & Lesser and the individuals constituting the said firm, within five days after the entry of the said order, to turn over and pay to Horace G. Pender, as Trustee in Bankruptcy of the above-named estate, the sum of Two Thousand ($2,000.00) Dollars,

Now upon reading and filing all of the papers enumerated in the said order of Hon. Oscar W. Ehrhorn, dated the 21st day of August, 1931, and the testimony taken in connection therewith, together with the exhibits therein referred to, and all papers heretofore filed herein, and the petition to review herein of the said Conrad, Rubin & Lesser, verified the 27th day of August, 1931, by William W. Conrad, and the exceptions to the said order of the Referee dated the 29th day of August, 1931, and the opinions of the said Referee dated the 17th day of July, and the 14th day of August, 1931,

And after hearing Conrad, Rubin & Lesser, Esqs., respondents in person, by Samuel Rubin, of counsel, in sup-[fol. 66] port of the said petition to review, and Krause & Hirsch, Esqs., attorneys for the Trustee, by George C. Levin, of counsel, in opposition thereto, and due deliberation having been had, and upon the opinion of this Court filed the 25th day of September, 1931, it is

Now on motion of Krause & Hirsch, attorneys for the Trustee herein,

Ordered that the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy herein, dated the 21st day of August, 1931, be and the same hereby is in all respects confirmed, and it is further

Ordered that the petition to review filed herein on or about the 27th day of August, 1931, be and the same hereby is dismissed, and it is further

Ordered that the firm of Conrad, Rubin & Lesser, and the individuals constituting said firm, namely, William W. Conrad, Samuel Rubin, and Claire F. Lesser, attorneys for David Bell Scarves, Inc., be and they hereby are jointly and severally directed within five days after the entry of this order and service of a copy thereof, upon them at their offices, No. 150 Broadway, in the Borough of Manhattan, City of New York, to turn over and pay to Horace G. Pender, as Trustee in Bankruptcy of the estate of David Bell Scarves, Inc., the sum of $2,000.00, the property of the said bankrupt estate.

Dated New York, October 1st, 1931.

Francis G. Caffey, U. S. D. J.

[fol. 67] In United States District Court, Southern District of New York

In Bankruptcy. #49939

In the Matter of David Bell Scarves, Inc., Bankrupt

Opinion of Francis G. Caffey, D. J.

It is clear and, I believe, it is without dispute that the words "in contemplation of the filing of a petition by or against him" contained in Section 60 (d) of the Bankruptcy Act relate only to the state of mind of the debtor and not to what his lawyer thinks about (Tripp v. Mitschrich, 211 Fed. 424, 427; Quinn v. Union Nat. Bank, 32 Fed. [2d] 762, 767).

With respect to compensation of lawyers, the courts are in irreconcilable conflict upon the question as to whether or not sections 60 (d) and 64 (b) 3 are completely cor-

relative—the one applying preceding and the other applying subsequent to the filing of the petition. So far as I can discover the Supreme Court has not settled the dispute. For the present purpose it would be useless to discuss all the cases. The authorities seem to agree, however, that services, the determination of whose value is within the summary jurisdiction conferred by Section 60 (d), must be of a type which renders them germane to the general aims of the Bankruptcy Act (see In re Rolnick, 294 Fed. 817, 819-0; In re Falk, 30 Fed. [2d] 607, 609). The problem is to ascertain in each instance whether the particular serv-[fol. 68] ices involved are, in the sense of this expression, germane to the general aims of the statute.

The testimony of one of the respondents himself is to the effect that his firm was retained a few days before the filing of the bankruptcy petition (after serious financial difficulties of the debtor intervened); also that the services were to consist of negotiating for a settlement with creditors and, in the event of settlement, of attempting to arrange for raising the money needed to carry it out. While the line of demarcation is drawn between the two sections, so far as concerns the time element, at the date of bankruptcy (In re Rolnick, 294 Fed. 817, 819-0; In re Klein-Moffett Co., 27 Fed. [2d] 444), and to that extent the two provisions of law are correlative, nevertheless under Section 60 (d) the question persists, were the services germane to the general aims of the Bankruptcy Act? Whatever other tests there may be, if the services were germane, summary jurisdiction is conferred by Section 60d.

In In re Cummins, 196 Fed. 224, 226, and In re Klein-Moffett Co., 27 Fed. (2d) 444, 445, it was said in substance that services to bring about a settlement so as to avoid bankruptcy, and services in obtaining fresh money to enable the failing debtor to continue in business were germane to the general aims of the Bankruptcy Act. If this be true, then the value of the services may be adjudicated under Section 60 (d).

The inclusion in Section 60 (d) of various narrative words to describe lawyers, e. g. solicitors in equity, proctor in admirality, etc.—seems to me to negative the motion that the character of the services covered by it are identical [fol. 69] with services covered by Section 64 (b) 3, differing only as to date of rendition—the former dealing with

those preceding filing of the petition and the latter with those following filing of the petition. It is hardly to be conceived that Congress contemplated that solicitors in equity or proctors in admiralty should be engaged to perform the type of services required in administering a bankrupt estate. In consequence, I feel that the respondents are contending for an interpretation of Section 60 (d) which would eliminate or nullify some of its words.

Upon the present record, the referee was fully warranted in concluding, and I think from the circumstances that the inference is inescapable (Cf. Quinn v. Union Nat. Bank, 32 Fed. [2d] 762, 767-8), that, when the debtor engaged the respondents, he contemplated bankruptcy. Accepting the testimony of one of the respondents, it appears incontrovertibly that the employment was exclusively for the formulation of arrangements that would have adjusted affairs of the debtor in some fashion with all of his creditors and would have affected, for the benefit of the estate, all the assets of the debtor. As it seems to me, it is wholly consistent with the language of Section 60 (d) to construe the jurisdiction there conferred to embrace authority summarily to fix the reasonable value of fees for services in such matters—including attempted adjustments designed to avoid bankruptcy—and that it would render some of the language surplusage or meaningless to construe the jurisdiction as excluding this subject.

There must be plain and strong ground for depriving language of a statute of full operation before the Court is [fol. 70] justified in confining it to a field more restricted than that comprehended within the literal words. Nullification of the words in the statute by implication such as is sought by the argument that the two sections discussed are completely correlative, is not favored in the law. I have been unable to find any warrant for limiting the natural application of the phraseology in Section 60 (d) so as to remove from it services of the character that were performed by the respondents.

The Court of Appeals for the 8th Circuit (Tripp v. Mitschrich, 211 Fed. 424, 427), pointed out in 1914 that the words of the Federal Revenue Act "in contemplation of death" as to testimentary gifts are of import similar to the words of the Bankruptcy Law with which we are not concerned. Since then the Supreme Court (United States

v. Well, 283 U. S. 102), has definitely settled that this expression in the tax law means that the thought of death was the impelling motive. I think it is clear here that the thought of bankruptcy was the impelling motive of the debtor when he retained the respondents.

Referee's order confirmed.

Dated September 25th, 1931.

Francis G. Caffey, U. S. D. J.

[fol. 71] In United States District Court

[Title omitted]

Assignment of Errors

Now come William W. Conrad, Samuel Rubin and C. F. Lesser, and make and file this, their assignment of errors.

That the Court erred in this order in each of the several respects hereinafter specifically enumerated:

1. In making the order dated October 1st, 1931, confirming the report of Hon. Oscar W. Ehrhorn, referee in bankruptcy, dated August 21st, 1931.

2. In dismissing the petition for review filed herein on the 27th day of August, 1931.

3. In directing the said William W. Conrad, Samuel Rubin and C. F. Lesser to turn over and pay to Horace G. Pender, as trustee in bankruptcy, the sum of $2,000.00.

4. In holding that the referee and the said United States District Court had jurisdiction under Section 60d of the Bankruptcy Act to re-examine the payment of $2,500.00 to the said Conrad, Rubin & Lesser.

5. In holding that the services rendered by the said Conrad, Rubin & Lesser were within the scope of the provisions of Section 60d of the Bankruptcy Act and were subject to [fol. 72] review and re-examination.

6. In denying the application of the said Conrad, Rubin & Lesser to dismiss the petition filed by the trustee in bankruptcy for a review and re-examination of said payment.

7. In resolving the questions of fact or law or both herein in favor of the said trustee in bankruptcy.

8. In holding that the services rendered by the said Conrad, Rubin & Lesser were germane to the purposes of the Bankruptcy Act and as such, were subject to review and re-examination by the Court and/or referee.

Wherefore the said William W. Conrad, Samuel Rubin and C. F. Lesser pray that the order of the United States District Court for the Southern District of New York, dated October 1st, 1931, be reversed and the said petition by the trustee to re-examine said payment and to direct the repayment of any part thereof be dismissed in accordance with law.

Dated New York, October 30th, 1931.

Conrad, Rubin & Lesser, Petitioners in Person.
Office & P. O. address: 150 Broadway, Borough of Manhattan, City of New York.

[fol. 73] In United States Circuit Court of Appeals, Second Circuit

[Title omitted]

Stipulation as to Exhibits

It is hereby stipulated and agreed by and between the parties to this appeal, for the purpose of shortening the record, that the printing of Trustee's Exhibits 1, 5 (marked for identification), 6, 7 and 10, in full, be waived and that statements of the material portions may be used in lieu thereof; and

It is further stipulated and agreed that in the event that at the argument of this appeal, reference to the said exhibits becomes necessary, either party may refer to the originals with the same force and effect as if produced as part of this record.

Dated New York, April 4, 1932.

Krause, Hirsch & Levin, Attorneys for Respondent.
Conrad, Rubin & Lesser, Attorneys for Appellants.

[fol. 74] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true transcript of the record of the said District Court of the United States for the Southern District of New York in the above-entitled matter as agreed on by the parties hereto.

Dated New York, April 26th, 1932.

Krause & Hirsch, Attorneys for Trustee. Conrad, Rubin & Lesser, Appellants.

[fol. 75] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 76] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1932

No. 49

Argued October 19, 1932. Decided November 14, 1932

In the Matter of David Bell Scarves, Inc., Bankrupt; Conrad, Rubin & Lesser, Appellants; Horace G. Pender, Trustee in Bankruptcy, Appellee

Appeal from the District Court of the United States for the Southern District of New York

Before L. Hand, Swan, and Augustus N. Hand, Circuit Judges

From an order directing the appellants to pay over to the trustee in bankruptcy a sum of money representing part of an attorney's fee paid to them by the bankrupt for services to be rendered, they have appealed. Affirmed.

For opinion below, see (D. C.) 52 F. (2d) 755.

Conrad, Rubin & Lesser, of New York City (Samuel Rubin, of New York City, of counsel), for appellants.

Krause, Hirsch & Levin, of New York City (George C. Levin, of New York City, of counsel), for appellee.

OPINION

SWAN, Circuit Judge:

This proceeding was initiated by the trustee's notice of motion and petition for re-examination under section 60d of the Bankruptcy Act (11 U. S. C. A. §96 (d)) of a $2,500 retainer paid to the appellants by the bankrupt corporation twelve days before an involuntary petition in bankruptcy was filed against it. Upon the return of the trustee's motion and petition, the appellants objected to the jurisdiction of the referee, but the objection was overruled, and, after a hearing in which the appellants refused to take part, an order was entered directing them to return to the trustee the sum of $2,000. The order of the referee was confirmed by the District Court, and from the latter order this appeal was taken. The sole issue it presents is of the jurisdiction of the referee to re-examine the payment under the circumstances disclosed.

The corporation was in financial difficulties and unable to meet its maturing obligations. Prior to retaining the appellants, it had engaged another attorney, Mr. Pratt, to negotiate a settlement with its creditors, and a meeting with some of its creditors had been held. Apparently the appellants were retained to supplement the efforts of Mr. Pratt, to whom $750 had already been paid upon a promised fee of $2,000. Mr. Conrad's testimony, given at an examination under section 21a, Bankr. Act (11 U. S. C. A. §44 (a)), was to the effect that he was to negotiate with creditors for a 50 per cent cash settlement and was to assist the corporation in hypothecating its accounts receivable in order to obtain the necessary money to carry out such a settlement. His affidavit, submitted in opposition to the referee's jurisdiction, states that the most extreme course which was within the contemplation of himself and Mr. David Bell, the bankrupt's president, was continuance of the business under an equity receivership, although that course was not contemplated if the business could be continued under the supervision of a committee of creditors,

or a representative of the New York Creditors' Adjustment Bureau, Inc. It also appears that within two weeks [fol. 77] prior to November 5th, when the appellants' retainer was paid, David Bell had withdrawn $1,500 from the corporation, and his brother, who was an employee, had withdrawn $750. The cash resources of the corporation were so low that the appellants' retainer could not be paid until a sale of merchandise was made; the purchaser's $2,500 check was then indorsed to the appellants. Upon these facts the District Court concluded that the thought of bankruptcy was the impelling motive of the debtor corporation when its president retained the appellants. Hence the payment was held subject to summary re-examination.

The section under consideration reads as follows:

"(d) If the debtor shall, directly or indirectly, in contemplation of the filing of a petition by or against him, pay money or transfer property to an attorney and counselor at law, solicitor in equity or proctor in admiralty for services to be rendered, the transaction shall be re-examined by the court on petition of the trustee or any creditor and shall only be held valid to the extent of a reasonable amount to be determined by the court, and the excess may be recovered by the trustee for the benefit of the estate."

In re Wood & Henderson, 210 U. S. 246, 28 S. Ct. 621, 52 L. Ed. 1046, has authoritatively settled that this section justifies summary proceedings and a readjustment of the attorney's compensation if the facts present a case within its terms. When a debtor is in such straits that he knows he is likely to end in the bankruptcy court and he engages an attorney to take steps to prevent it, a payment in advance for services of that character would seem clearly to fall within the literal terms of the statute; the payment is made "in contemplation of" bankruptcy no less when made to fend against it than when made to bring it about.

It is true, however, that the section has not received a uniform interpretation by the courts, as this court recognized in Re Falk, 30 F. (2d) 607, 609, and there are numerous dicta and a few decisions which seem to limit the literal language of the section. In an early case, In re Kross, 96 F. 816 (D. C. S. D. N. Y.), the question involved was the allowance of a fee under section 64b (3), 11 U. S. C. A.

§ 104 (b) (3), and in deciding it Judge Brown remarked that section 60d must be read with section 64b (3), and that both relate to the same character of services. It is generally agreed that the services for which an allowance may be made under section 64b (3) must be such as relate to "the performance of the bankrupt's duty in aid of the estate and its administration." In re Kross, 96 F. 816 (D. C. S. D. N. Y.); In re Mayer, 101 F. 695 (D. C. S. D. Wis.); In re Rosenthal & Lehman, 120 F. 848 (D. C. E. D. Mo.); In re Christianson, 175 F. 867 (D. C. D. N. D.); In re Malkiel, 29 F. (2d) 790 (D. C. D. Mass.); Remington, Bankruptcy (3d Ed.) § 2726. Services which benefit only the bankrupt are not entitled to priority of payment out of the estate. Randolph v. Scruggs, 190 U. S. 533, 539, 23 S. Ct. 710, 47 L. Ed. 1165. But we find nothing in the statute to limit the services, payment for which in advance is examinable under section 60d, to services of the same character as are allowable under section 64b (3). The former relates only to services to be rendered before bankruptcy is instituted, In re Rolnick, 294 F. 817 (C. C. A. 2); the latter in general to services after petition filed. Indeed, the reference in section 60d to solicitors in equity and proctors in admiralty clearly implies that the character of the services with which that section deals is not so limited. See Pratt v. Bothe, 130 F. 670, 673 (C. C. A. 6); Furth v. Stahl, 205 Pa. 439, 55 A. 29. However, even though Judge Brown's dictum be repudiated, there remain several other opinions that import into section 60d a requirement that the services for which compensation is allowable thereunder shall be such as are "germane to the aims of the Bankruptcy Act." See In re Habegger, 139 F. 623, 3 Ann. Cas. 276 (C. C. A. 8); In re Stolp, 199 F. 488 (D. C. E. D. Wis.); In re Rolnick, 294 F. 817 (C. C. A. 2); Quinn v. Union Nat. Bank, 32 F. (2d) 762, 765 (C. C. A. 8); In re Lang, 20 F. (2d) 239, 241 (D. C. E. D. Pa.). Upon these authorities the appellants base their contention that a payment for services not "germane" is not examinable under section 60d.

These cases furnish very slight support for such contention. With the possible exception of In re Stolp, they did not discuss the question of jurisdiction. On the contrary, they assumed that the payments attacked might be re-examined, apparently no objection having been made to

jurisdiction, and they declare that only for "germane" services could any compensation be allowed. The appellants argue that "it must necessarily follow" from the rule that only payments for "germane" services are protected that jurisdiction to re-examine a payment for services not [fol. 78] "germane" is lacking. This appears to be a plain non sequitur. The premise is that, as to services in no way beneficial to the estate or connected with the duties of a bankrupt, no compensation is allowable. The conclusion need not be, as the appellants urge, that none of the retainer is recoverable by the trustee under section 60d; rather it may be that the whole of it is recoverable, as In re Habegger seems actually to have held. As the court pointed out in Tripp v. Mitschrich, 211 F. 424, #428 (C. C. A. 8), it is necessary to distinguish between what is re-examinable and what is allowable. "The former relates to jurisdiction; the latter assumes jurisdiction and inquires what is a proper charge." With the validity of the appellants' premise we are not now concerned. An allowance of $500 has been granted them, and no one questions it. Even assuming the validity of the premise, we cannot accede to the conclusion asserted to follow from it.

Section 60d would seem to require that, regardless of the nature of the services to be rendered, any retainer paid to an attorney when the debtor's impelling motive in paying it was the thought of the imminency of bankruptcy, should be subject to re-examination by the court. Whether upon such re-examination the court should allow him to keep a part of the retainer as a reasonable compensation for services actually rendered, even though the services were of a character that could not be of advantage to the creditors, such as defending the debtor against a charge of crime, we need not now say. Nor need we even go so far as to decide that a retainer for services of that character is subject to re-examination. All we need hold is that a retainer to negotiate a settlement with creditors, if made in contemplation of bankruptcy, is re-examinable. With the exception of In re Habegger (C. C. A.) 139 F. 623, 3 Ann. Cas. 276 (which allowed recovery of the full amount paid) no case has suggested that such services are not "germane" to bankruptcy, if that be necessary, and several cases have in fact re-examined retainers paid for similar services. In re Habegger, supra; Slattery v. Dillon,

17 F. (2d) 347 (C. C. A. 9); In re Lang, 20 F. (2d) 239 (D. C. E. D. Pa.); In re Klein Moffett Co., 27 F. (2d) 444 (D. C. D. Md.); In re Cummins, 196 F. 224 (D. C. S. D. N. Y.); Furth v. Stahl, 205 Pa. 439, 55 A. 29. See, also, Tripp v. Mitschrich (C. C. A.) 211 F. 424, 430. In Slattery v. Dillon, the jurisdiction of the referee was expressly challenged; in the other cases cited it does not appear that objection to jurisdiction was raised. That the retainer in the case at bar was paid in contemplation of bankruptcy seems too clear to admit of controversy. When the client and attorney are considering an equity receivership in case the creditors will not accept an offered settlement, it is inconceivable that the imminence of bankruptcy and the avoidance of it is not present in their thoughts.

Order affirmed.

[fol. 79] In United States Circuit Court of Appeals, Second Circuit

In the Matter of David Bell Scarves, Inc., Bankrupt; Conrad, Rubin and Lesser, Appellants

Decree—Filed Nov. 21, 1932

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be, and it hereby is, affirmed, with costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 80] [File endorsement omitted.]

[fol. 81] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 82] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 27, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,415. U. S. Circuit Court of Appeals, Second Circuit. Term No. 718. Conrad, Rubin & Lesser, petitioners, vs. Horace G. Pender, trustee in bankruptcy. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1933. File No. 37,415.